IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No. 25 of 2001
Reserved on 24.7.2007
Date of decision 23.8.2007

Prem Dass Appellant

Versus

Smt.Kamla Devi Respondent

Coram:

The Hon'ble Mr.Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Appellant: Mr.K.D.Sood, Advocate.

For the Respondents: Mr.Bhupender Gupta, Senior Advocate, with Mr.Parneet Gupta, Advocate,

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Rajiv Sharma, J.

A challenge has been laid by way of this regular second appeal to the judgment and decree passed by the District Judge, Hamirpur on 2.1.2001 in Civil Appeal No.49 of 1993.

The brief facts necessary for the adjudication of the second appeal are that the respondent-plaintiff hereinafter referred to as the plaintiff for convenience sake, had filed a suit in the court of Sub Judge Ist Class (1), Hamirpur for declaration with consequential relief of permanent prohibitory injunction for restraining the defendant from interfering with the possession of the plaintiff over land as comprised in Khasra Nos. 13 to 16, 23 to 25, 27 to 28 and 76 to 81, measuring 5354.78 Sq. Mtrs. situated in Up Mahal Chauhala, Khurd Mahal, Hamirpur as per Jamabandi for the year 1980-81.

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

The trial court on the basis of the pleadings of the parties had framed the following issues:-

1. Whether the plaintiff is entitled to the relief of permanent injunction as prayed? OPP

2. Whether the suit is not maintainable in the present form? OPD

3. Whether the suit is within limitation for declaration? OPP

4. Whether the plaintiff is estopped from filing this suit by her act and conduct? OPD

5. Whether the defendant has become owner of suit land as alleged? OPD

5-A Whether the suit is not maintainable under section 53-A T.P.A., as alleged? OPD

6. Relief

The trial court had given the following findings on the issues framed hereinabove:

Issue No.1 No, but suit decreed for possession.

Issue No.2 No

Issue No.3 Yes

Issue No.4 No

Issue No.5 No

Issue No.5A No

Relief Suit decreed for possession as per operative portion of the judgment.

The trial court on the basis of the oral and documentary evidence decreed the suit in favour of the plaintiff for possession of the suit land.

The defendant-appellant hereinafter referred to as the defendant for the convenience sake, preferred an appeal before the learned District Judge, Harmirpur. The learned District Judge had framed the following points for determination:-

1 Whether the learned trial Judge has been just in adjudging that the respondent-plaintiff is entitled to the possession of the suit land and not entitled for the grant of permanent injunction against the appellant:

2 Final order.

The learned District Judge had recorded the following findings on the aforesaid points:

Point No.1 Yes

Point No.2 Appeal is dismissed as per operative part of the judgment.

The learned District Judge dismissed the appeal on 2.1.2001.

The present second appeal has been filed by the defendant-appellant against the judgment and decree passed by the learned District Judge, dated 2.1.2001.

This second appeal was admitted by this Court on the substantial questions of law No.1, 3 and 4 as formulated at page 5 of the paper book.

Mr.K.D.Sood had strenuously argued that the judgment and decree passed by the courts below are not sustainable in the eyes of law. He had further contended that the relief which was not sought for in the suit had been granted in favour of the plaintiff. He had further contended that the courts below have misread the oral as well as documentary evidence led by the parties. Mr.Bhupender Gupta, had supported the judgments and decrees passed by the courts below.

I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

All the substantial questions of law being interconnected are taken up together.

I have perused the record placed by the parties before the courts below. There is no misreading of documentary evidence as far as the copies of jamabandis including Rapat Rojnamcha are concerned. The Rapat No.949 dated 2.8.1971 was to be read in conjunction with the copies of later jamabandis, including Ex.P6 for the year 1973-74. In the Jamabandi for the year 1973-74 all the co-owners, including the plaintiff were recorded as joint owners in possession of the whole of the land in respect of Khata No.7, measuring 86 kanals 16 marlas. A family partition took place between the co sharers vide mutation No.83 and as per Exts. P-11 to P-15 each co-owner was given exclusive ownership and possession out of the joint holdings to the extent of their respective shares. The suit land was acquired by the plaintiff on the basis of family partition.

The courts below after appreciating the evidence had come to the right conclusion that the defendant had failed to prove his adverse possession on the suit land. The contention of Sh.K.D.Sood that the possession of his client was protected under Section 53-A of the Transfer of Property Act is liable to be rejected. The plaintiff had never agreed to sell the suit land to Sudama Ram, predecessor-in-interest of the defendant. She had not received any consideration for the suit land from either of them. The defendant had led no evidence that he incurred expenditure on the litigation initiated by the plaintiff against Roshan Lal. The plaintiff had examined her husband Jagdish Chand as PW-1, besides this, Dewan Chand, PW-2, Onkar Chand PW-3 and Kishori Lal PW-4 had been examined. These witnesses had testified that the suit land was owned and possessed by the plaintiff. It was never in possession of the defendant. The defendant had appeared himself as DW-1. Sh.Prema, DW-2 has stated only that the plaintiff had enough land in Tika Cholla which she used to get

cultivated on labour charges. DW-4 Amar Nath had stated that he used to cultivate the land of Prem Dass which is situated at Village Cholla. DW-9 Chaudhary Ram had admitted in his statement that a part of suit land is in possession of the defendant and remaining part is in possession of the plaintiff. The courts below have correctly appreciated the oral evidence led by both the parties.

The plaintiff had prayed for the following reliefs which read as under:

> "It is therefore, prayed that a decree for declaration that the plaintiff is the owner in possession of land entered in Khata No.5min, Khatoni No.14, Khasra Nos. 13, 14, 15, 16,, 23, 24, 25, 27, 28, 76, 77, 78, 79, 80, & 81 Plots 15 area measuring 5354.78 Sq. Mts. Jamai Rs.2.20 p. Up Mahal, Chauhala Khurad, Mahal Hamirpur per Jamabandi 1980-81. Defendant has no concern of interest the suit land. The revenue entry in the name of defendant in possession as trespasser is against the factual position at the spot and the same is liable to be corrected and plaintiff is entitled to remain in possession as before as full owner.
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> As a consequential relief the defendant be restrained from interfering in the possession of plaintiff by issuance of permanent injunction.
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> In case the defendant succeeds in getting forcible possession or is proved to be in possession and plaintiff is not entitled to decree in prayer 'A', then in the alternative;
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> B) Decree for possession of land detailed in prayer 'A'"

It is clear from the aforesaid prayer made in the plaint that the plaintiff had also prayed for decree for possession of land detailed in prayer ('A') Accordingly there was no need for seeking amendment of the plaint as argued by Sh.K.D.Sood.

There is no inconsistency in the relief prayed for in the plaint. Both the reliefs as prayed for could be granted by the civil court. In a case **Bundi**

Singh vs. **Shivanandan Prasad Sahu**, AIR 1950 Patna 89 , their Lordships have held as under :

> "With regard to S.42, Specific Relief Act, I think the suit was not bad, because the plaintiff did actually ask for the consequential relief which was appropriate to the pleadings. Maintaining that he was still in possession, he asked as a consequential relief that the defendant should be restrained from interfering with his possession. He could not ask for recovery of possession. If he did not concede that he had been dispossessed. But then it is urged that a decree for recovery of possession could not be passed on the pleadings. The answer to this is to be found in O.7, R.7, Civil P.C. It is true it has been held that under O.7 R.7, a relief cannot be given which is inconsistent with the plaintiff's case and the reliefs actually asked for. But, in my opinion, the inconsistency in this case was not of a type which would bar the application of O.7, R.7. A perusal of the judgment of the final Court of fact shows that the finding of defendant's possession was merely a finding that the defendant had not himself recorded in Register D and had realized rents from at least some of the tenants. It was not inconsistent with the plaintiff's contention that he also had been realizing some rents. Therefore, the question of possession was one upon which two views were possible. It would be a question of degree whether the realisation of rents by the defendant had been on such a scale as to amount to complete dispossession of the plaintiff. This being so, the finding, having regard to its nature, is consistent with the plaintiff's case being honest and bona fide since the plaintiff might have honestly considered that technically he was still in possession and that a declaration and injunction was the appropriate remedy. In such circumstances, it would, in my opinion, be stretching technically too far to hold that O.7. R.7 could not be applied, and so to deny to the plaintiff the relief to which he was actually found entitled by the Court. "

Similarly, a Division of Karnataka High Court has held in **Smt. Neelawwa v. Smt. Shivawwa**, AIR 1989 Karnataka 45 that a suit for declaration of title and for injunction restraining defendant from alienating the suit property was maintainable. Their Lordships have held as under:

"It is contended by Sri A.B.Patil learned counsel for respondent/defendant that in the suit the plaintiff has only sought for a declaration and injunction restraining the defendant from alienating the suit property and there is no prayer for partition and separate possession, therefore, the prayer made by the appellant cannot at all be granted. No doubt in the plaint there is no specific prayer made by the plaintiff seeking partition and separate possession of her share in the suit land. In our opinion this should not come in the way of granting a preliminary decree for partition and separate possession of the share of the plaintiff. Once it is declared that the plaintiff is entitled to a half share in the suit land, the necessary consequence of it is to divide the suit land and give her half share. As all the persons entitled to a share in the suit land are parties to the suit, in a suit of this nature the relief for partition must be deemed to have been prayed for in the suit. It is also relevant to notice that the relief of partition and separate possession flows from the same cause of action which forms the basis for the present suit. Denial of such a suit would only lead to another suit. Multiplicity of proceedings should normally be avoided as the same tends to delay justice. In the facts and circumstances of the case the relief of partition and separate possession becomes a consequential relief. In First Appeal No.231 of 1987, Rangappa v. Jay amma decided on 17.6.1987, under more or less similar circumstances, we have considered the scope of R.7 of O.VII of the Civil P.C. and held as follows:-

> "The words "and it shall not be necessary to ask for general or order relief which may always be given as the Court may think just to the same extent as if it had been asked for are wide enough to empower the Court to grant such relief. The plaintiff is entitled to on the facts established on the evidence on record, even if such relief has not been specifically prayed for.
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> 8.1. The provisions of O.VII, R.7 of the C.P.C. are so widely worded that they do enable the court to pass a decree for partition in a suit for declaration of title to immovable property and possession thereof where it turns out that the plaintiff is not entitled to all the interest claimed by him in the suit

property. In such a situation there is nothing unusual in giving relief to the parties by directing partition of the suit property according to the share of the parties established in the suit. The normal rule that relief not founded on the pleadings should not be granted is not without any exception. Where substantial matters constituting the title of all the parties are touched in the issues and have been fully put in evidence, the case does not fall within the aforesaid rule. The court has to look into the substance of the claim in determining the nature of the relief to be granted. Of course, the Court while moulding the relief must take care to see that relief it grants is not inconsistent with the plaintiff's claim, and is based on the same cause of action on which the relief claimed in the suit, that it occasions no prejudice or causes embarrassment to the other side; that it is not larger than the one claimed in the suit, even if, the plaintiff is really entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint.

8.2. No doubt the plaintiff has sought for exclusive title and he has not been able to prove his exclusive title; but has been able to prove that he is entitled to a half share in the suit properties. When a party claims exclusive title to the suit property and is liable to establish that he is entitled to half of the suit property, it will not be unusual for the Court to pass a decree for partition and possession of his half share. In fact such a relief flows from the relief prayed for in the plaint that he is the exclusive owner of the entire property. When a larger relief is claimed and what is established is not the entire relief claimed in the suit but a part of it, s whole includes a part, larger relief includes smaller relief, and it also arises out of the same cause of action. Therefore in the instant case, nothing prevented the Court to pass a decree for partition, in order to avoid another suit for partition and to give relief to the party in conformity with the right he had established."

> Therefore we are of the view that instead of driving the plaintiff to another suit for partition, in conformity with the right she has established, it is just and appropriate to pass a preliminary decree for partition and separate possession of her half share. The plaintiff has not also lost her right in the suit property because the suit is filed within 12 years from the date of the death of her father. In other words, within 12 years from the date the property developed upon her or the succession opened. Therefore, even if a separate suit has to be filed for partition, the defendant does not have any sustainable defence. Therefore no prejudice will be caused to the defendant/respondent if a preliminary decree for partition and separate possession is passed in this suit itself. Accordingly Point No.2 is also answered in the affirmative and in favour of the plaintiff/appellant."

The upshot of the above discussion is that the finding recorded by both the courts below with regard to adverse possession being finding of fact are not liable to be interfered with. Moreover, no question of law much less any substantial question of law arises for determination in this appeal. Accordingly, there is no merit in the second appeal and the same is dismissed with no order as to costs.

August 23, 2007(g) **(Rajiv Sharma), J.**